

Richard B. Kielbowicz, "Discrimination or Discriminating Licensing?: FCC Policy and Newspaper Ownership of TV Stations, 1945-1970," *Administrative Law Review* 30 (Summer 1978): 423-46.

Abstract

Before 1970, the FCC treated diversification of media ownership on a case-by-case basis, largely continuing a policy it had developed in licensing radio stations to newspapers. Financially well situated, newspapers sought assignments in the early unprofitable years of television broadcasting, and secured many licenses in uncontested proceedings. Even when forced to undergo a comparative hearing, newspaper applicants capitalized on intrinsic advantages. Newspapers suffered a demerit on the diversification criterion in seeking a television license, but this was frequently offset by a positive showing on other criteria—local ownership, integration of ownership and management, program proposals, staffing, facilities, and broadcast experience. These strengths brought by newspaper applicants served the FCC's short-term goal of putting viable stations on the air as quickly as possible, but came at the expense of the long-term objective of diversifying media ownership. As one court observed in 1957, "while lack of experience is cured with time, lack of diversification is not." The FCC hesitated to take the diversification initiative itself, a timidity reinforced by Congress. The Justice Department's Antitrust Division emerged as the most vigorous champion of diversification, and in the 1960s it encouraged the FCC to take more seriously the implications of licensing television stations to newspapers.

Keywords: media ownership, newspaper-television cross-ownership, media concentration, FCC policy, broadcast licensing, diversification of media ownership

DISCRIMINATION OR DISCRIMINATING LICENSING?: FCC POLICY AND NEWSPAPER OWNERSHIP OF TV STATIONS, 1945-1970

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Newspapers had managed to obtain 160 television licenses by 1970 in spite of the Federal Communication Commission's long-standing commitment to foster diversified control of the mass media.¹ Not until 1970 did the FCC take the first step to limit further awards of television licenses to co-located newspapers.² Why had diversification been subordinated to other goals in the Commission's licensing scheme? What part did Congress, the courts, and the newspaper industry play in shaping diversification policy before 1970?

I. RADIO LEGACY

In making television assignments to newspapers, the FCC built upon its years of experience in licensing radio stations. On March 20, 1941 the FCC announced that it would investigate various press-radio ties, including a "consideration of statements of policy or rules, if any.

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¹Of 666 commercial television stations reporting data in November 1969, 160 were affiliated with newspapers. *FCC moves to split up newspapers, radio, tv*, Editor & Publisher, April 4, 1970, at 11.

²FCC, *Further Notice of Proposed Rule Making in the Matter of Multiple Ownership of Standard, FM and Television Broadcast Stations*, 35 Fed. Reg. 5,963 (1970).

which should be issued concerning future acquisition of broadcast stations by newspapers."³ Before the hearings convened, the Newspaper-Radio Committee—a spinoff of the American Newspaper Publishers Association (ANPA)—began marshalling its resources and arguments.⁴

The ANPA counsel asserted from the outset that the FCC lacked authority for such inquiries.⁵ But the hearings continued and among those testifying were distinguished journalism scholars who presented arguments amenable to the newspaper industry: a ban against press ownership of broadcast outlets would be discriminatory;⁶ newspapers should have the opportunity to hedge their position by purchasing interests in a competing medium;⁷ and coming from a tradition of newsgathering, newspapers could inculcate journalistic values in a predominantly entertainment medium.⁸

These views reflected a newspaper bias, that is, an underestimation of radio's potential as a purveyor of news and molder of opinion. The comments of Fredrick S. Siebert, a historian specializing in the English roots of press freedom, exemplified the notion that newspapers were the primary purveyors of information:

Since I consider newspapers as very important to our form of government, since I consider radio as another medium of communication, the denial to newspapers of the use of that medium, and the granting it to others, might possibly result in severe damage to the American newspaper and a loss of a large part of its freedom.⁹

This statement implies that the independence of newspapers must be preserved, even at the expense of radio's autonomous development.

The FCC heeded the advice of these newspaper allies. When the Commission finally issued a statement on *Newspaper Ownership of Radio Stations* in 1944,¹⁰ it essentially affirmed the policy that had evolved from earlier ad hoc licensing decisions. Simply, the FCC said that competing applications for licenses would be designated for com-

parative hearings. An applicant without newspaper or other media interests would be given a preference in diversification, one of several categories weighed in the final determination.¹¹

A court of appeals put its imprimatur on this policy in the 1942 case of *Stahlman v. FCC*.¹² James G. Stahlman, publisher of the Nashville *Banner* and vice-chairman of the Publishers National Radio Committee, had ignored an FCC subpoena to appear and testify at the Radio-Newspaper hearings. The court held that the FCC's licensing authority empowered it to summon witnesses in drafting reasonable licensing rules.¹³ Ominously, the court advised in *dicta* that if the Commission had been considering a policy of proscribing newspaper ownership of broadcast stations

we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress has clothed the Commission. For we have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station.¹⁴

The FCC subsequently acknowledged the merits of diversification, but awards to newspapers continued.¹⁵ In fact, the FCC smiled upon awards of FM stations to newspaper owners because they were "in a position to support the new industry until it reaches profitability."¹⁶ Thus a newspaper applicant suffered a demerit on the diversification factor, but usually overcame this handicap. The same was to hold true for television licensing.

II. FCC TELEVISION DIVERSIFICATION POLICY

Newspaper owners were among the first to appraise television licenses highly, though few economies of scale apparently were realized from joint newspaper-television ownership.¹⁷ With profitable years following the Second World War,¹⁸ the newspaper industry moved quickly

³FCC, *High Frequency Broadcast Stations*, 6 Fed. Reg. 1580 (1941).

⁴E. EMERY, *HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION* 209 (1950).

⁵Butler, *FCC Radio Inquiry Opens With Opposition By Press Groups*, Editor & Publisher, July 26, 1941, at 3.

⁶Newspaper-Radio Committee, *Freedom of the Press: What It Is, How It Was Obtained, How It Can Be Retained* 49 (1942) (testimony of Fredrick S. Siebert).

⁷*Id.* at 48.

⁸*Id.* at 35 (testimony of Frank L. Mott, Director of Journalism, University of Iowa).

⁹*Id.* at 48.

¹⁰9 Fed. Reg. 702 (1944).

¹¹*Id.*

¹²126 F.2d 124 (D.C. Cir. 1944).

¹³*Id.* at 127.

¹⁴*Id.*

¹⁵Agee, *Cross-Channel Ownership*, 26 JOURNALISM Q. 410, 413 (1949).

¹⁶1957 FCC Annual Report 21.

¹⁷Levin, *Economies in Cross Channel Affiliation of Media*, 31 JOURNALISM Q. 167, 171 (1954); see also Agee, *supra* note 15, at 410.

¹⁸The after taxes profit of *Editor & Publisher's* typical 50,000-circulation daily was at its peak in the years immediately following the war. Expressed as a percentage of total revenues, the profits were: 1945, 15.35 percent; 1946, 13.11; 1947, 13.77; 1948,

to gain a foothold in the burgeoning television field. In 1945, only one of the nine television stations on the air was affiliated with a newspaper. But by 1953, newspapers held 78.9 percent of the television licenses. The number of newspaper controlled stations shortly dwindled to 37.1 percent as others raised capital to enter the field.¹⁹

Newspapers seeking a television permit followed one of two paths in applying to the FCC. If there was only one technically and financially qualified applicant for a station, it routinely received the license in an uncontested grant. Where there were mutually exclusive applicants, the license was awarded after a comparative hearing. Unfortunately, it is difficult to study the dynamics of the FCC's awards of uncontested licenses because records were not developed as fully as in comparative hearings.

A 1958 FCC study does much to explain the success of newspapers as applicants for television construction permits. Newspapers held majority interests in 139 television stations on the air in February 1958. Of these, slightly more than half had been uncontested awards. Moreover, in 17 cases, competing applicants had withdrawn, obviating the need for comparative hearings.²⁰

Uncontested Grants

The FCC held all television applications in abeyance from 1948 to 1952 while it devised a national allocation plan for the medium. When licensing resumed, the Commission at first "concentrat[ed] on the many pending noncompetitive TV applications."²¹ Meanwhile, the FCC and the Federal Communications Bar Association worked to streamline the competitive hearing process.²² The Commission welcomed competitors for a television assignment to merge their applications "mak[ing] possible early action . . . on the single application remaining."²³ Merged applications were processed immediately, without redesignation for the uncontested line. Such expeditious handling minimized possible intervention by protesters.²⁴ Similarly, the FCC backed

legislation which would have rendered ineffectual any protests of uncontested grants.²⁵

FCC Chairman George C. McConaughy in 1956 explained to Congress the Commission's policy regarding newspaper applicants for licenses in noncomparative proceedings.

[T]he fact of newspaper ownership is irrelevant except insofar as it may indicate that a grant of the application would be contrary to the public interest because it would result in an undue concentration of control of the media of mass communication. Moreover, the Commission has never denied an application in an uncontested case solely because the applicant had newspaper interests. The only instance in which the Commission has denied an application in a noncomparative case because of the circumstances surrounding the applicant's newspaper interests was the *Mansfield Journal* case.²⁶

During the same hearings, ANPA counsel Elisha Hanson acknowledged that "most of the licenses" going to newspapers were uncontested.²⁷

The 1955 *Clarksburg Publishing Co. v. FCC*²⁸ decision affords unique insights into the Commission's handling of noncompetitive awards. The newspaper-owning Ohio Valley Broadcasting Corp. received a television permit for Clarksburg, West Virginia, one day after the only competitor withdrew its application. Ohio Valley notified the FCC that it had reimbursed the competitor "\$14,390 for out-of-pocket expenses incurred in the preparation and prosecution of its application."²⁹ With the only competitor removed, the FCC awarded the permit to Ohio Valley without seriously examining the corporation's many media properties in the region. A daily newspaper in Clarksburg protested the noncompetitive award on the grounds that it contravened the Commission's diversification of ownership rule, and that the payment to the competing applicant for its withdrawal was contrary to the public interest.³⁰ Judge David Bazelon found that the FCC had erred in denying the protest because the decision was based on an inadequately developed record.³¹

²⁵1954 FCC Annual Report 19. See also, 98 CONG. REC. 7,393 (1952), where the FCC balked at congressional strengthening of the full hearing protest procedure.

²⁶*Communications Act Amendments; Hearings on H.R. 6968 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 36 (1956). In *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950), the Court upheld an FCC denial of a radio license to the only newspaper in Mansfield, Ohio, because it had used its position as monopoly publisher to coerce advertisers.

²⁷*Hearings*, *supra* note 26, at 327.

²⁸225 F.2d 511 (D.C. Cir. 1955).

²⁹*Id.* at 519 n.28 (letter to FCC).

³⁰*Id.* at 513.

³¹*Id.* at 514.

12.13; 1949, 9.91; 1950, 10.25; 1951, 8.05; 1952, 7.06; 1953, 7.00; 1954, 5.20; 1955, 4.75; 1956, 5.25; 1957, 4.44. Brown, *50,000-Daily's Profit Lowest Since 1945*, Editor & Publisher, April 19, 1958, at 24.

¹⁹H. LEVIN, BROADCAST REGULATION AND JOINT OWNERSHIP OF MEDIA 53 (1960).

²⁰*Number of TV Stations in which Daily Newspapers Have a Majority Interest or More, February 1958*, FCC-mimeo #58231, quoted in H. LEVIN *supra* note 19, at 176, 195 n.8.

²¹1952 FCC Annual Report 11.

²²1953 FCC Annual Report 16.

²³*Id.* at 95.

²⁴*Id.* at 108.

After cataloguing Clarksburg's media holdings,³² Bazelon found it "difficult to understand how the Commission could have concluded that the grant would not result 'in an unlawful concentration of control or in a monopoly of the media for mass communications in the West Virginia area.'"³³ Fully cognizant of Ohio Valley's stranglehold on print and broadcast media in West Virginia, the Commission nonetheless had concluded that the award of the television station was not contrary to the public interest, "especially since the Ohio Valley interests do not publish newspapers in Clarksburg itself where the protestant owns the only daily newspapers."³⁴ Apparently because there was no threat of a monopoly in Clarksburg itself, the Commission felt that Ohio Valley's media holdings did not disqualify the company from receiving another television assignment.

Diversified control of the media was subordinated to the Commission's conception of the public interest as requiring the swift establishment of nationwide television service. After a four-year suspension in making television assignments, the FCC doubtless felt compelled to establish service without delay. But uncontested awards always may not have been in the best long-term interests of the public.

Awards from Comparative Hearings

A. *Conflicts with other objectives*

Mutually exclusive applications for a license were designated for a comparative hearing. Examining the reports of comparative hearings best elucidates the FCC's quandaries in observing its commitment to diversification of ownership. Diversification of ownership was one of several criteria weighed in the comparative hearing. Other factors included local ownership, integration of ownership and management,

program proposals, staffing, facilities, and broadcast experience.³⁵ The newspaper owner seeking a television permit received a demerit on the diversification criterion, but this frequently was offset by a positive showing in other areas. In fact, contrary to the claims of the newspaper industry, the comparative hearing process at times seemed to favor the newspaper applicant.

Not surprisingly, a newspaper applicant often was preferred on the local interest factor. Of five applicants for four television authorizations in Washington, D.C., the wholly-owned subsidiary of a newspaper company in 1946 received the first construction permit because of its top rating on local interest.³⁶ In 1954 the Cowles Broadcasting Co., affiliated with the major newspapers in Des Moines, prevailed over a competing applicant for a television permit in that city despite a poor showing on diversification. Its local ownership and obvious knowledge of community needs were significant assets.³⁷ And in 1956 the only daily and Sunday newspaper in Omaha outshone its rival for a television permit on nearly every factor, including local interest.³⁸

Only rarely was a newspaper applicant for a license in its own community eclipsed on the civic participation factor.³⁹ A newspaper's support of civic affairs was taken as a measure of an applicant's civic participation.⁴⁰ The nonnewspaper applicant obviously did not have the same means of registering its civic participation. Newspapers, presumably in touch with community concerns, had a built-in advantage for the criteria of local ownership and civic participation when seeking a co-located television station.

Fortified with resources from existing media holdings,⁴¹ newspaper applicants often fared well in the comparative criteria of proposed programming, staffing, and facilities, plus the assurance of effectuating proposals. Success in these categories was a function of an applicant's financial backing. The 1957 Hearst, Inc. application for a Pittsburgh television station reflected that media giant's coffers, helping it to overcome a handicap in diversification.⁴² Two applicants in an earlier hearing, both closely affiliated with major newspapers in the area of the

³²According to the FCC:

In the radio and television field, Ohio Valley operates broadcast stations in Clarksburg and Parkersburg; News Publishing Company, its parent corporation, controls [AM and FM] radio and television stations in Wheeling; and one of its officers has an interest in a Cumberland, Maryland radio and television operation. In the field of journalism, the circulation of the newspapers published by Ohio Valley interests in West Virginia totals approximately 150,000 copies daily [about three-fourths of all papers published in that area]. Ohio Valley interests publish newspapers in many key West Virginia cities, including the only newspaper or newspapers in these communities.

Ohio Valley Broadcasting Corp. 10 Pike & Fischer Radio Regulation 969, 985 (1954) [hereinafter RR].

³³Clarksburg Publishing Co. v. FCC, 225 F.2d 511, quoting Ohio Valley Broadcasting Corp., 10 RR 985.

³⁴*Id.*

³⁵See Note, *The Criteria Employed by the FCC in Granting Mutually Exclusive Applications for Television Facilities*, 45 Geo. L. J. 265 (1956-57).

³⁶Bamberger Broadcasting Service, 3 RR 914, 925.

³⁷Cowles Broadcasting Co., 10 RR 1289, 1316.

³⁸KFAB Broadcasting Co., 12 RR 317, 397.

³⁹See, e.g., Toledo Blade Co., 15 RR 739, 833 (1958).

⁴⁰Columbia Amusement Co., 12 RR 509, 565 (1956).

⁴¹"For newspapers entering television generally have their own frequency-modulation and standard broadcast outlets. . . ." H. LEVIN, *supra* note 19, at 57.

⁴²Television City, Inc., 14 RR 333, 462f (1957).

proposed television station, outdistanced a poorly financed competitor on almost every comparative criteria except diversification.⁴³ And the Washington *Evening Star* was prepared to underwrite much of the financing for its proposed station by purchases of stock in the new venture and by supplying unsecured loans.⁴⁴ A newcomer to the communications industry thus often appeared financially undernourished when pitted against an applicant with newspaper interests.

The FCC's preference for an owner who would participate in the management of a station clashed with a policy of fostering diverse and antagonistic sources of news in situations where the owner had newspaper interests. The Commission, however, never indicated that it even recognized this contradiction in objectives. Likewise, in reviewing the planned news programming of an applicant, the Commission did not consistently favor proposals calling for the complete separation of the newspaper staff and that of the television station.

In six hearings from 1946 to 1961 where the newspaper applicant was preferred for integration of ownership and management, the FCC failed to take note of any potential problems arising from the newspaper executives' operation of television stations.⁴⁵ Ironically in a 1961 hearing, the Commission awarded the preference for integration of ownership and management to the newspaper applicant, but in a different part of the decision reaffirmed its commitment to maintaining "the widest possible dissemination of information from diverse and antagonistic sources."⁴⁶ A new television station closely managed by the owners of a newspaper contributed little to "diverse and antagonistic sources of news." Where a newspaper-owning applicant did not propose to directly manage a station, it was accordingly penalized on the integration of ownership and management standard.⁴⁷

The FCC belatedly awoke to the dangers of a newspaper sharing its news and facilities with its proposed television station. In a 1954 comparative hearing the FCC accepted an illusory separation of news reports. "It is sufficient to note that both Tribune and Pinellas propose separate staffs from the associated newspapers and have in the past objectively reported the news," the Commission concluded.⁴⁸ But the

hearing examiner's findings of fact showed that both Tribune and Pinellas intended to use sources available to their newspapers and that the *Tribune* planned to rewrite its newspaper copy for television.⁴⁹

A newspaper's agreement to supply news to a proposed television station was not considered a significant matter in a 1955 hearing.⁵⁰ Shreveport Television arranged with a local newspaper to receive reports in return for spots promoting the paper; the applicant and newspaper were not affiliated by ties of ownership. The Commission was prepared to ignore this arrangement unless there was evidence "that the news stories received by the television station from the newspaper would not constitute objective reporting."⁵¹ Virtually identical facts were presented to the Commission the same year in KTBS, Inc.⁵² Although KTBS, Inc. was not associated by ties of ownership with any newspaper, it arranged to receive reports from the local press.⁵³ This left the Commission in a "no-win" situation: it decided against KTBS' rival because of ties to local media, including newspapers; but the award to KTBS did not bring a new autonomous news source to Shreveport either.

A more enlightened conception of competition in news reporting surfaced in a 1962 hearing. Explaining the poor showing of an applicant in comparisons of proposed programming, the Commission said,

The facts also show that the news facilities, film facilities, library and morgue of the newspaper will be used by the television station and, at least to that extent, their operations will be interrelated. Competition in the fields of information, news, advertising and local expression will be fostered by a grant of the construction permit for Channel 10 to an applicant who has no comparable connections in the mass media field.⁵⁴

In keeping with the tenor of the 1950s, the Commission was preoccupied with the paramount journalistic value of the day—objectivity. Objectivity of the news reports, not the multiplicity of media voices serving a community, seemed to weigh most heavily with the Commission. But in the 1960s, consistent with a policy pronouncement,⁵⁵ the Commission elevated multiple independent news reports to a primary spot in its hierarchy of objectives.

⁴³The Tribune Co., 9 RR 719 (1954).

⁴⁴Bamberger Broadcasting Service, 3 RR 922.

⁴⁵*Id.*, at 921; The Tribune Co., 9 RR 770b; Radio Fort Wayne, Inc., 9 RR 1221, 1222h (1954); Columbia Amusement Co., 12 RR 572; Biscayne Television Corp., 11 RR 1113, 1156 (1956); WIBC, Inc., 22 RR 425, 471 (1961).

⁴⁶*Id.* 22 R.R. at 470.

⁴⁷*See, e.g.*, Northeastern Indiana Broadcasting Co., Inc., 9 RR 261, 314 (1953).

⁴⁸The Tribune Co., 9 RR 770d.

⁴⁹*Id.* at 755.

⁵⁰Southland Television Co., 10 RR 699 (1955).

⁵¹*Id.* at 742.

⁵²10 RR 811 (1955).

⁵³*Id.* at 838-39.

⁵⁴Florida Gulfcoast Broadcasting, Inc., 23 RR 1, 116 (1962); *see also* discussion of WHDH in text at notes 96-103 *infra*.

⁵⁵*See infra*, note 78 and accompanying text.

Another factor considered during a comparative hearing was the broadcast experience of the applicants. This boosted the chances for many newspaper applicants by allowing them to capitalize on the experience they had acquired since getting in on the ground floor of radio assignments.⁵⁶ A newspaper applicant would frequently compensate for a poor showing in diversification with a good showing in broadcast experience.⁵⁷ The Commission apparently was blind to the basic inconsistency in a policy which discouraged concentration of ownership but rewarded broadcast experience gained by owning a station. One court noted that the preferences for broadcast experience and superior broadcast record arose from an applicant's "concentration of media of mass communication, which is itself an adverse rather than a preferential factor."⁵⁸ The court felt that "'while lack of experience is cured with time, lack of diversification is not.'"⁵⁹

B. Diversification policy to 1965

Outlines of a diversification policy regarding newspaper applicants for television permits emerged case-by-case through the 1950s and early 1960s. Not until 1965 did the Commission codify its ad hoc decisions into a policy placing a premium on diversification.

In deciding between applicants, the Commission often looked for the potential of practices in restraint of trade resulting from an award of a television permit to a newspaper owner.⁶⁰ Where an applicant owned two newspapers in a community and had used joint advertising rates (i.e., an advertiser buying an ad in the morning paper must purchase space in the evening paper, and vice versa), the Commission found little cause for concern because "the papers are in *common* ownership and therefore would not commonly be expected to be competitive. . . ."⁶¹ But joint advertising rates used in conjunction with a

separately owned newspaper reflected poorly on "the applicant's disposition to operate a broadcast station in the public interest."⁶² And the Commission frowned on an applicant who had used combination rates for a *commonly owned newspaper and radio* station.⁶³

Fortunately the FCC rejected pleas that it use television authorizations to equalize competitive positions of the media. A Portland, Oregon newspaper sought a television permit in 1954 partly on the grounds that a grant would give it "a measure of equality with the dominant newspaper in Portland which has a 50 percent interest in a radio and television operation in Portland."⁶⁴ The Commission did not seriously entertain the argument.

The Commission did look at the amount of competition among the media in an area to determine if the award of a television permit to a newspaper might constrict the sources of news and information available to a community. In 1954 the Commission observed that the diversification principle "is not limited to monopoly because its purpose, as its name connotes, is to promote diversification in the sources of information."⁶⁵ Not long after enunciating this principle, however, the Commission awarded a television permit to a company publishing the only sizeable dailies in Des Moines, adopting the hearing examiner's explanation that given five radio and two television stations in the city the diversification "factor loses its over-powering position and only becomes entitled to equal consideration with other factors."⁶⁶ This undercut the efficacy of the diversification objective; wherever there were competing media, no threat of monopoly existed, and a newspaper applicant at worst suffered a minor demerit on one of several factors.

Some commissioners, moreover, *preferred* newspaper applicants as long as there was no possibility of a media monopoly. Robert Lee, joined by Chairman McConnaughey, dissented from a grant of a television permit to an applicant without any media ties.⁶⁷ Lee would have awarded "a point of preference for—instead of against—based on newspaper ownership" absent a media monopoly.⁶⁸ Lee was impressed by newspapers' community roots, their newsgathering (rather than

⁵⁶See note 41 *supra*.

⁵⁷See, e.g., Bamberger Broadcasting Service, 3 RR 914; Cowles Broadcasting Co., 10 RR 1289; Biscayne Television Corp., 11 RR 1113; Columbia Amusement Co., 12 RR 509; WHDH, Inc., 12 RR 507 (1957); Television City, Inc., 14 RR 333; Florida Gulfcoast Broadcasters, Inc., 23 RR 1; Community Telecasting Corp., 24 RR 1.

⁵⁸Sunbeam Television Corp. v. FCC, 243 F.2d 26, 29 (D.C. Cir. 1957).

⁵⁹*Id.* at 29 n.6, quoting, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L. J. 365, 377 (1957).

⁶⁰No one may operate or own the assets of a station "if in either case, the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce . . . or unlawfully to create monopoly in any line of commerce." Federal Communications Act, 47 U.S.C. § 314 (1962).

⁶¹Loyola University, 12 RR 1017, 1112 (1956) (emphasis added); see also, WKRG-TV, Inc., 10 RR 225 (1955); Toledo Blade Co., 15 RR 739.

⁶²Radio Fort Wayne, Inc., 9 RR at 1222k.

⁶³Loyola University, 12 RR at 1112.

⁶⁴Oregon Television, Inc., 9 RR at 1456e.

⁶⁵Tampa Times Co., 10 RR 77, 138 (1954).

⁶⁶Cowles Broadcasting Co., 10 RR at 1314.

⁶⁷Radio Station KFVH Co., 11 RR 1, 115 (1955).

⁶⁸*Id.* at 116b.

entertainment) experience, and their commendable record as radio licensees.⁶⁹

By discounting the diversification factor wherever competing media precluded a possible monopoly, the Commission abetted the growth of media groups consisting of many scattered properties. After reviewing the extensive newspaper, radio, and television holdings of Hearst, Inc., the Commission in 1957 awarded the firm a television station in Pittsburgh. That result was influenced by the presence of competition from all media in the area.⁷⁰ Next year, the Commission tightened the Gannett Company's grip on the media in upstate New York by granting it a Rochester television station. No egregious concentration in Rochester—where there were competing broadcast stations—would result from the grant, the Commission maintained.⁷¹

The Commission's ingenuity was tested when choosing from among applicants all having media properties concentrated at either local, regional, or national levels. Diversification figured most prominently where there was a threat of local concentration of control.⁷² Only rarely did the Commission find that dangers of local concentration were outweighed by the threats of regional⁷³ or national concentrations.⁷⁴

The FCC sometimes faced the dilemma of choosing to give either a local newspaper or a local radio station a television permit. A local radio station was preferred over a local newspaper where the past practices of the newspaper applicant cast doubts on its suitability to operate a station;⁷⁵ where the newspaper had a monopoly of dailies published in the city;⁷⁶ and in cases where, though not having a monopoly,

the newspaper applicant was the dominant publisher in the proposed coverage area.⁷⁷

Two dimensions of diversification policy delineated as early as 1955 were finally codified and amplified in the 1965 *Statement on Comparative Broadcast Hearings*.⁷⁸ As the Commission explained in 1955 in *Radio Wisconsin*, "an applicant's comparative status is affected by its broadcast (or newspaper) interests, if any, in the particular locality involved (concentration aspect) as well as its ownership of broadcast (or newspaper) interests without restriction to that locality."⁷⁹ The 1965 Statement formalized this policy: "Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area, and finally, generally in the United States."⁸⁰ More important, the 1965 Statement, albeit in ambiguous language, elevated the diversification factor to "a primary objective in the licensing scheme."⁸¹ Thenceforth, it was to be given more than equal consideration with any other single factor.⁸²

C. Diversification policy, 1970

The policy *Statement on Comparative Broadcast Hearings* did not leave the Commission with immutable rules to follow in weighing an applicant's newspaper interests. Three years later, the FCC commenced rulemaking proceedings on the multiple ownership of broadcast stations, but the proposed rules did not embrace newspaper ownership.⁸³ Dismayed by the narrow scope of the proposed rulemaking, the Anti-trust Division of the Justice Department appealed to the "Commission to consider carefully the advisability and feasibility of extending, in

channel AM and a FM station in the community; Toledo Blade Co., 15 RR at 823-24, where prevailing broadcast applicant controlled an AM and FM station in the city.

⁷⁷Appalachian Broadcasting Corp., 11 RR at 1399, prevailing broadcast interest had an AM station in the community; Florida Gulfcoast Broadcasters, Inc., 23 RR at 116, prevailing broadcast interest had five scattered AM stations, including one in the city. *But cf.* Bush-Moore Newspapers, Inc., 11 RR 641, 699 (1956), where the publisher of weekly and bi-weekly shopping papers prevailed over an applicant with interests in a local radio station; in KFAB Broadcasting Co., 12 RR at 395-96, the FCC awarded a permit to the monopoly publisher of the Omaha newspapers in preference to an applicant with extensive broadcast holdings nationally.

⁷⁸5 RR2d 1901.

⁷⁹10 RR 1224, 1245 (1955).

⁸⁰5 RR 2d at 1908.

⁸¹*Id.*

⁸²Ultravision Broadcasting Co., 12 RR2d 137, 161 (1968).

⁸³FCC, *Proposed Rule Making in the Matter of Multiple Ownership of Standard, FM and Television Stations*, 33 Fed. Reg. 5,315 (1968).

⁶⁹*Id.* Note that this preference for newspaper owners was cast in the terms used by newspaper champions at the 1941 Newspaper-Radio hearings. See text at note 2 *supra*.

⁷⁰Television City, Inc., 14 RR at 462f.

⁷¹WHEC, Inc., 14 RR 150, 179 (1958). In upstate New York alone, Gannett had three AM stations, a 49 percent interest in an Elmira, New York, UHF-TV, and 27 percent of the daily newspaper circulation—including 90 percent of all newspapers circulated in Monroe County, where Rochester is located.

⁷²*E.g.*, in the following cases newspapers lost their bids for television assignments partly because of threats of local concentration: Northeastern Indiana Broadcasting Co., Inc., 9 RR 261; Radio Fort Wayne, Inc., 9 RR 1221; Oregon Television, Inc., 9 RR 1455; Richmond Newspapers, Inc., 11 RR 1234; Appalachian Broadcasting Corp., 11 RR 1327 (1966).

⁷³WIBC, Inc., 22 RR 425.

⁷⁴KFAB Broadcasting Co., 12 RR 317.

⁷⁵Radio Fort Wayne, Inc., 9 RR at 1222L.

⁷⁶Northeastern Indiana Broadcasting Co., Inc., 9 RR at 317, where the prevailing broadcast applicant had an AM and FM station in the city; Richmond Newspapers, Inc., 11 RR at 1278c, where the prevailing broadcast interest had theaters, a clear

some form, the policy of the proposed amendments to license-renewal proceedings and to newspaper-broadcasting combinations."⁸⁴

The Commission proceeded to draft a one-to-the-market rule that did not apply to newspaper-broadcast ownerships. When the new rules were promulgated, Chairman Dean Burch dissented in part on the grounds that the Commission produced "a rule which applied to areas of ownership least needing attention, if at all."⁸⁵ Burch wanted the Commission to focus on VHF-daily newspaper combinations because

There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources.⁸⁶

The same day that the Commission announced the new multiple ownership rules it entered a further notice of proposed rulemaking specifically aimed at divestiture and newspaper ownership.⁸⁷

One proposed rule—that "no grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market"⁸⁸—signaled the end of the first phase of the Commission's diversification policy.⁸⁹

Transfers and Renewals of Ownership

A. Transfers

Newspapers obtained many television licenses from transfers in ownership, as Harvey Levin has clearly shown.⁹⁰ Transfers were granted reflexively as nowhere did the parties have to demonstrate that a re-assignment would advance the public interest. In 1959 protesters intervened to block the transfer of a radio and television station to a company operating two television stations, five AM stations, two FM stations, and six daily newspapers in Wisconsin and Minnesota. The Commission granted the transfer without a hearing and denied the protest, maintaining that no egregious regional concentration would result from the reassignment.⁹¹

⁸⁴Walter B. Kerr, *The Problem of Combinations*, SAT. REV. October 12, 1968, at 83 (quoting Justice Department memo).

⁸⁵FCC, *In the Matter of Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 18 RR2d 1735, 1760 (1970).

⁸⁶*Id.*

⁸⁷*Further Rule Making*, *supra* note 2, at 5,963.

⁸⁸*Id.* at 5,965.

⁸⁹*Id.*

⁹⁰H. LEVIN, *supra* note 19, at 177.

⁹¹M & M Broadcasting Co., 17 RR 1215, 1251 (1959).

In 1968 the Commission was notified that the licensee of KFOM, Beaumont, Texas, wished to transfer control to the monopoly publisher of daily newspapers in Beaumont. "Only after intervention and protest by the Department of Justice did the Commission even indicate that a hearing would be required before Commission approval could be granted. The parties quietly dropped that proposal."⁹²

The next year, Beaumont Television Corp. sought to transfer the station to the A. H. Belo Corp., owner of the *Dallas Morning News*, a Dallas AM, FM, and television station, and whose principals published several smaller newspapers in the region. The Commission enumerated the competing media in the area, and reflexively concluded that "a grant of the transfer application would serve the public interest, convenience, and necessity."⁹³ Commissioner Nicholas Johnson's dissent prefigured the 1977 Court of Appeals ruling in *National Citizens Committee for Broadcasting v. FCC*⁹⁴ which reversed the presumption that an assignment would be in the public interest. Johnson said,

[T]he burden before this agency is upon the applicants; they must show how the public interest will be served by approving this application. . . . The opportunity for "diverse and antagonistic voices" to present information and ideas to the people of Texas will decrease. It is incumbent upon the parties to come forward with some explanation as to how the public will benefit from this transaction. There is not one iota of evidence or rationale presented in the application. None has been put forward by our staff, nor by the majority of the Commissioners.⁹⁵

B. The WHDH renewal imbroglio

Although WHDH ultimately forfeited its license, partly because of its concentrated media control, the early stages of that protracted renewal decision saw the FCC downplaying the importance of diversification. In the initial 1957 award, WHDH's superior broadcast record enabled it to prevail over three other applicants despite the poorest showing on diversification. "The abundant competitive media" in Boston minimized dangers of concentrated control posed by WHDH's ties to an AM and FM station and two jointly owned dailies in the

⁹²Beaumont Television Corp., 16 RR2d 93, 97 (1969) (commissioner Johnson, dissenting).

⁹³*Id.*

⁹⁴The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest. 555 F.2d 938, 966 (D.C. Cir. 1977); 98 S.Ct. 2096 (1978), *aff'd in part & rev'd in part*.

⁹⁵Beaumont Television Corp., 16 RR2d at 98.

area, the Commission concluded.⁹⁶ Following a court decision in the matter,⁹⁷ the Commission reaffirmed the initial grant, but renewed the license for only four months.⁹⁸ Until 1969, while various hearings were in progress, the Herald-Traveler Corp. operated WHDH under temporary authorizations.

A full comparative hearing in 1969 considered WHDH's application for renewal alongside new applications for the assignment.⁹⁹ The Commission later took pains to emphasize that the "unique events and procedures of WHDH's licensing history, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license."¹⁰⁰ The final decision was against WHDH, with Boston Broadcasters, Inc., the victor. The Commission noted that the diversification policy would "be significantly advanced by a grant of either" of the competing applications.¹⁰¹ Evaluating WHDH's ties to its sister newspapers, the Commission was more exacting in 1969 than it had been in 1957. Although in 1957 the Commission had dismissed as inconsequential WHDH's use of newspaper personnel and newsgathering facilities,¹⁰² in 1969 it felt that similar overlap "inured to the disadvantage of the broadcast stations and their listeners."¹⁰³

The *Herald-Traveler* folded soon after the corporation's television license failed renewal and critics claimed that decision diminished rather than contributed to media diversity. But this charge overlooked the fact that the *Herald-Traveler* and the Hearst-owned *Boston Record American* "were like two tired old prizefighters, battering each other in the middle of the ring, hoping to God the other would collapse first," in the words of a Herald editor.¹⁰⁴ Also, the preoccupation of *Herald-Traveler* management with WHDH had been detrimental to the fortunes of the newspaper. Thus the decision probably did increase the number of media voices in the Boston area.

⁹⁶WHDH, Inc., 13 RR at 582.

⁹⁷*Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958). The court asked the FCC to consider what effect informal contacts between a WHDH director and the FCC chairman had on WHDH's suitability to receive an assignment.

⁹⁸WHDH, Inc., 24 RR 255 (1962).

⁹⁹WHDH, Inc., 15 RR2d 411 (1969).

¹⁰⁰WHDH, Inc., 16 RR2d 185, 203 (1969).

¹⁰¹WHDH, Inc., 15 RR2d at 427.

¹⁰²WHDH, Inc., 13 RR at 583.

¹⁰³WHDH, Inc., 15 RR2d at 426.

¹⁰⁴Thomas, *Did Boston's "Herald Traveler" Have to Fail?* COLUM. JOURNALISM REV., July/August 1972, at 41, 44.

The forfeiture of WHDH's license sent shockwaves through the newspaper and broadcast industries. Newspapers, with interests in 160 television stations, apprehended that the decision ushered in a period when diversification would be pursued with vigor. Broadcasters feared that licenses no longer would be reflexively renewed, that new applicants challenging incumbents might "destabilize" the industry.¹⁰⁵ The fears were exaggerated and overlooked the unique characteristics of the WHDH decision, but they nevertheless prompted the Commission to issue a reassuring *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*.¹⁰⁶

The new policy statement, in essence, allowed an incumbent licensee rendering substantial service to have its license renewed; new competing applications would be dismissed without a hearing. The Commission decided "it would appear unfair and unsound to follow policies whereby" a renewal applicant who had rendered good service "could be ousted on the basis of a comparative demerit because of his media holdings."¹⁰⁷ General rules, not "ad hoc decisions in renewal hearings" was the preferred method of diversifying control of the industry.¹⁰⁸ But the 1971 case of *Citizens Communication Center v. FCC*,¹⁰⁹ coupled with public denunciations and congressional rebukes, effectively overruled the 1970 policy statement.¹¹⁰

III. CONSTRAINTS ON FCC DIVERSIFICATION POLICY

The Courts

Decisions of the courts, at least prior to 1970, did little to prod the FCC into adopting a more aggressive diversification policy. The courts upheld the fundamentals of the policy, at most disagreeing with fairly minor aspects of its application in specific cases.

As early as 1945, in *Associated Press v. United States*, Justice Hugo Black, for the majority, conceived that the First "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

¹⁰⁵*Id.* at 43.

¹⁰⁶18 RR2d 1901.

¹⁰⁷*Id.* at 1097.

¹⁰⁸*Id.*

¹⁰⁹447 F.2d 1201 (D.C. Cir. 1971).

¹¹⁰See *Analysis of FCC's 1970 Policy Statement on Comparative Hearings Involving Regular Renewal Applicants: Staff Study for the Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d sess. (1970).

public.”¹¹¹ “Diverse and antagonistic sources” has been read to anchor the FCC’s diversification policy and was frequently cited by the Commission to uphold that component of its licensing decisions.

Advisory language in *Stahlman v. FCC*¹¹² put the Commission on notice that the courts might not approve a rule prohibiting newspaper ownership of broadcast outlets. But the Court of Appeals, in the 1951 radio case *Scripps-Howard Radio v. FCC*,¹¹³ sustained the ad hoc diversification criterion used in comparative hearings, and largely deferred to the Commission’s judgment in applying the criterion. *Massachusetts Bay Telecasters, Inc. v. FCC*¹¹⁴ reiterated the *Scripps-Howard* finding. On judicial review courts would only correct the Commission’s errors of law as long as diversification was considered as one of several relevant aspects, the *Massachusetts Bay* court held.¹¹⁵ The courts, too, generally upheld particular facets of the Commission’s diversification policy. For example, a 1958 Court of Appeals ruling sustained the FCC’s contention that it did not have to rule on whether a competitive advantage vis-a-vis other local media would result from a broadcast assignment to a newspaper.¹¹⁶

*Clarksburg Publications Co. v. FCC*¹¹⁷ was one of the few judicial frontal assaults on the FCC’s diversification decisions. In that 1950 case, Judge David Bazelon reprimanded the Commission for its haste in granting a license after the only competing applicant had withdrawn. He also censured the FCC for its casual observance of diversification.¹¹⁸ In 1957, *Sunbeam Television Corp. v. FCC*¹¹⁹ raised doubts about the logic of comparative hearings in which concentration of media control weighed against an applicant, but broadcast experience and broadcast record counted positively. On balance, however, decisions of the courts inhibited development of a potent diversification policy.

Congress, the Newspaper Industry,
and the Justice Department

By overseeing the FCC and considering revisions of the 1934 Federal Communications Act, Congress had a hand in shaping diversification

policy. Equally important was Congress’ role in mediating between the newspaper industry, the Justice Department, and the Commission. The periodic revisions of the Communications Act undertaken during the 1950s and 1960s also afforded the newspaper industry opportunities to register its displeasure with the Commission’s diversification policy.

A. The discrimination bugaboo of the 1950s

Responding to the 1941 hearings on newspaper ownership of broadcast facilities, Congress, in 1947, considered an amendment to the Communications Act which would have foreclosed FCC consideration of an applicant’s newspaper affiliation. In ambiguous language, the proposal would have prohibited licensing rules or policies “which will or [might] effect a discrimination between persons based upon race, or religious or political affiliation, or kind of lawful occupation, or business association.”¹²⁰ The chairman of the FCC, Charles Denny, interpreted the section as “prevent[ing] the Commission from adopting a policy which would deny newspapers the right to own radio stations.” Thus construed, “it merely represents present practice.”¹²¹ An FM group and a newspaper-broadcast interest testified in favor of the anti-discrimination amendment.¹²² At the same time, there was some sentiment for the FCC to block *monopoly* newspaper publishers from obtaining co-located broadcast outlets.¹²³ The proposed anti-discrimination section was not reported from committee.

A virtually identical anti-discrimination section reappeared in the 1949 proposed amendments.¹²⁴ The Senate Committee on Interstate and Foreign Commerce deleted the section “because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.”¹²⁵

¹²⁰*To Amend the Communications Act of 1934: Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 12 (1947).

¹²¹*Id.* at 69.

¹²²*Id.* at 209, 434 (testimony of J. N. Bailey, Executive Director, FM Association; and statement of D. S. Elias, executive director of a radio station wholly owned by the local newspaper).

¹²³*Id.* at 567, 583 (statements of Bernard Johnpoll, licensee of an AM station and Richard T. Leonard, Vice President, UAW-CIO).

¹²⁴*Amendments to Communications Act of 1934: Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 7 (1949).

¹²⁵S. REP. NO. 711, 81st Cong., 1st Sess. 2 (1949).

¹¹¹65 S.Ct. 1416, 1424-25 (1945).

¹¹²126 F.2d 125; see discussion in text at note 12 *supra*.

¹¹³189 F.2d 677 (D.C. Cir. 1951) a radio case; *McClatchy Broadcasting v. FCC*, 239 F.2d 15 (D.C. Cir. 1956).

¹¹⁴261 F.2d 55 (D.C. Cir. 1958).

¹¹⁵*Id.* See also *Columbia Empire Telecasters, Inc. v. FCC*, 228 F.2d 459 (D.C. Cir. 1955).

¹¹⁶*Tri-State Broadcast Co. v. FCC*, 96 F.2d 564 (D.C. Cir. 1938), a radio case.

¹¹⁷225 F.2d 511 (D.C. Cir. 1955).

¹¹⁸*Id.* at 519, see discussion in text at note 33 *supra*.

¹¹⁹243 F.2d 26 (D.C. Cir. 1957).

Dissenting opinions of two commissioners in the hearing of *Hearst Radio, Inc.* spurred the House Interstate and Foreign Commerce Committee to revive an anti-discrimination amendment in 1952. "Unless there are overriding considerations, preference should be given to a nonnewspaper, nonmultiple-owner applicant as against an applicant" with media interests, Chairman Wayne Coy and Commissioner Edward M. Webster argued in *Hearst*.¹²⁶ But the majority in that decision held fast to the practice of weighing diversification equally with other factors. The House committee endorsed the latter position: "The views held by the Commission majority with respect to the interpretation of the Communications Act in connection with newspaper applications for radio and television licenses accurately reflect the views on this subject held by the House Committee on Interstate and Foreign Commerce."¹²⁷ Although in agreement with the Commission majority, Congress was sufficiently aroused by the two dissenting opinions to draft what came to be known as the newspaper amendment.

More specific than its antecedents, the 1952 newspaper amendment was added by the House committee to a bill amending the Communications Act. The amendment provided that, in considering applicants for licenses, renewals, or transfers, the Commission could not adopt rules the "result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information."¹²⁸ Although the word "newspaper" did not appear in the proposed amendment, it was undoubtedly designed to protect newspaper applicants.¹²⁹ Again, however, the newspaper amendment was deleted from the legislation. The conference committee maintained that the amendment was superfluous as the Commission lacked authority to promulgate a rule discriminating against newspaper applicants. The committee said the majority of the Commission already applied the diversification criterion in accord with congressional intent.¹³⁰ Three years later two bills designed to serve the same purpose as the aborted 1952 newspaper amendment were introduced in the House.¹³¹ Neither survived long.

Pervading these attempts to constrain FCC diversification policy was the perception on the part of the newspaper industry and many congressmen that the Commission was discriminating against news-

paper applicants. This perception of discrimination was largely unfounded, but nevertheless underlay many of the legislative initiatives discussed above.

The word "discrimination" appeared in all the proposals to shield newspapers, and it quickly became the shibboleth of the newspaper industry. Specious reasoning by analogy flourished in defense of newspaper applicants. One congressman, for instance, argued that if the Commission took into account the newspaper interests of applicants, "then just as easily the Commission might rule that if a man has red hair he shall be considered unfit to own a radio station or to engage in television."¹³² ANPA counsel Elisha Hanson, testifying on behalf of the 1955 amendment, characterized the FCC's diversification policy as a "discrimination policy." He added, "Newspaper ownership of or newspaper association with an applicant constitutes an almost irrebuttable presumption of comparative disqualification under present Commission policy."¹³³ Yet in the same testimony he acknowledged that newspapers received most of their television assignments in uncontested grants.¹³⁴

Hanson, Earl Abrams, and Representative John V. Beamer produced evidence that, on its face, seemed to support their contention that the FCC discriminated against newspapers.¹³⁵ Beamer noted that in the three years following the lifting of the television freeze, the Commission decided ten of twelve comparative hearings involving newspaper-connected applicants against the newspaper interests. In the ten decisions, he said, the Commission "placed major emphasis upon its diversification of media policy—or has managed by dint of grasping at minutiae to find some other weakness in the newspaper applicant's position which made it comparatively inferior—in order to render a decision against it."¹³⁶ One would have to concede that the FCC found against the newspaper applicants on the diversification criterion. But rarely was this the determinative factor in deciding which applicant received the license. The fallacy of Hanson's, Beamer's, and Abrams' argument was that it unfairly discounted the findings on other comparative considerations.¹³⁷

¹²⁶98 CONG. REC. 7,390 (1952) (remarks of Rep. Brown).

¹²⁷98 CONG. REC. 7,420 (1952) (remarks of Rep. Harris).

¹²⁸1 H.R. REP. NO. 1750, 82d Cong., 2d Sess. 9 (1952).

¹²⁹98 CONG. REC. 7,394 (1952) (remarks of Rep. Harris).

¹³⁰1 H.R. REP. NO. 2426, 82d Cong., 2d Sess. 19 (1952).

¹³¹1 H.R. 6968 and 6977, 101 Cong. Rec. 9,035 (1955).

¹³²The three men made essentially the same argument in separate testimony and articles: *Id.* at 328 (testimony of Hanson), 216 (a brief entered by Beamer); Abrams, *Diversification: Its Case History*, Broadcasting, November 1, 1954, at 86.

¹³³98 CONG. REC. 7,394 (1952) (remarks of Rep. Harris).

¹³⁴98 CONG. REC. 7,394 (1952) (remarks of Rep. Harris).

¹³⁵Rather than "grasping at minutiae," the Commission found substantial factors other than diversification that counted against each of the 10 newspaper applicants: Oregon Television, Inc., 9 RR 1401; The Enterprise Co., 9 RR 816; Tampa Times

It is hard to fathom how these newspaper champions could shout "discrimination against newspapers" in the face of so many newspaper-owned television stations. The flap over "discrimination" in the 1950s was grossly exaggerated and totally missed the point of FCC licensing decisions. "Discrimination" carried negative connotations; but the essence of licensing is to make a discriminating selection from among competing applicants. "Diverse and antagonistic sources" of information for the public mandated that the Commission discriminate in favor of applicants with no ties to other communications industries. The newspaper industry and some congressmen could not accept this principle.

B. *Inklings of change in the 1960s*

The brouhaha over alleged anti-newspaper discrimination seemed to wane in the late 1950s, perhaps as a consequence of the most attractive television authorizations having been taken.¹³⁸ Lone voices in Congress and the Antitrust Division of the Justice Department began to express concern about the ineffectual application of the FCC's diversification policy.

In a 1957 address to the Federal Communications Bar Association, Representative Emanuel Celler, chairman of the House Judiciary Committee, chided the Commission for its "disregard of antitrust principles in its licensing process."¹³⁹ His remarks were prompted by the Commission's award of a Boston television station to WHDH, Inc., affiliated with area newspapers and radio stations, over applicants with no media interests.¹⁴⁰ Celler, in 1960, proposed to no avail an amendment to the Clayton Antitrust Act aimed at regional concentrations of broadcast and newspaper interests.¹⁴¹

The Antitrust Division of the Justice Department emerged as the most vigorous champion of diversification. The Justice Department had advised Congress as early as 1951 that some proposed amendments

might "nullify the antimonopoly policy upon which the Communications Act is so highly founded."¹⁴² By 1968 the Division clearly preferred broadcast licensees unaffiliated with any other media and urged the FCC to scrutinize license renewals with diversification in mind. The Justice Department implied that existing provisions of the Clayton Antitrust Act might be invoked if the Commission failed to act.¹⁴³ This foreshadowed a change in the direction of diversification policy: breaking up cross-media concentrations at renewal time was fast becoming the only hope for achieving diversified control of the media.

CONCLUSION

The earliest FCC diversification policy was shaped by impressionistic and value-laden testimony that newspapers, the primary vehicles of mass communication, should not be unduly fettered in their push into new communications industries. The 1970 rulemaking, on the other hand, rested on empirical evidence that television and newspapers were the primary sources of news for most of the people. It must be noted that there was no evidence presented to indicate that newspaper-owned television stations offered an inferior news report.¹⁴⁴

Thus before 1970 the Commission treated diversification on a case-by-case basis. Well situated financially, newspapers sought assignments in the early unprofitable years of television broadcasting, and secured many assignments in uncontested proceedings. Even if forced to undergo a comparative hearing, a newspaper applicant capitalized on intrinsic comparative advantages.

The FCC hesitated to take the diversification initiative itself. *Dicta* in the *Stahlman* decision circumscribed the range of choices available to the Commission in implementing diversification. But it was just that—*dicta*; the courts never explicitly ruled that a proscription of newspaper ownership of broadcast outlets was unconstitutional or exceeded the Commission's authority. Congress reinforced the FCC's timid diversification policy; it certainly did little to prod the Commission into a more vigorous pursuit of diversified control of the media. The Justice Department, perhaps because it had a division immersed in anti-mo-

Co., 10 RR 77; Radio Fort Wayne, Inc., 9 RR 1221, 1222p (1954 and 1955); McClatchy Broadcasting Co., 9 RR 190; KTBS, Inc., 10 RR 1; WKRG-TV, Inc., 10 RR 225; The Radio Station KFJH Co., 11 RR 1; Richmond Newspapers, Inc., 11 RR 1235; Scripps-Howard Radio, Inc., 11 RR 985 (1956).

¹³⁸On the other hand, station growth has nearly reached its ceiling within the 12 VHF channels. Only 70 commercial VHF assignments within the continental United States are open for new stations under present minimum spacing requirements. These potential assignments are in sparsely populated areas. 1959 FCC Annual Report 53.

¹³⁹103 CONG. REC. APP. 9,900 (1957).

¹⁴⁰WHDH, Inc., 13 RR 507.

¹⁴¹H.R. 9486, 106 CONG. REC. 287 (1960).

¹⁴²*Amending Communications Act of 1934: Hearings on S. 658 Before the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 21 (1951).

¹⁴³Kerr, *supra* note 84, at 82-83; Huston, *Justice Dept. asks FCC to deny station licenses to newspapers: Rule would apply to renewals*, Editor & Publisher, August 10, 1968, at 14, 63.

¹⁴⁴*Further Rulemaking*, *supra* note 2, at 5,965.

nopoly activities, was the first entity to stir the Commission into taking action. The newspaper industry offered only a chorus of "discrimination" whenever the Commission briefly considered a more potent application of diversification policy, conveniently ignoring the advantages it enjoyed in the FCC's licensing process.